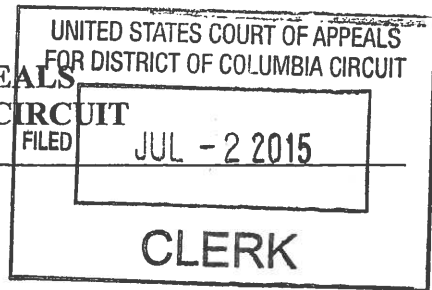


UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT



JUL - 2 2015
RECEIVED
800 RIVER ROAD OPERATING
COMPANY LLC d/b/a WOODCREST
HEALTH CARE CENTER

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

Respondent.

Petition for Review

15-1204

PETITION FOR REVIEW

Pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure, Petitioner 800 River Road Operating Company LLC d/b/a Woodcrest Health Care Center petitions this Court to review and set aside the ruling in the attached Decision and Order of the National Labor Relations Board that Petitioner violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act by refusing to recognize and bargain with 1199 SEIU United Healthcare Workers East (the "Union") as the exclusive collective-bargaining representative of the employees in the unit, and to furnish the Union with the requested information regarding the terms and conditions of employment of unit employees in the matter of "800 River Road Operating Company LLC d/b/a Woodcrest Health Care Center and 1199 SEIU United Healthcare Workers East" dated June 15, 2015 and reported at 362 NLRB No. 114.

By: 

Seth D. Kaufman

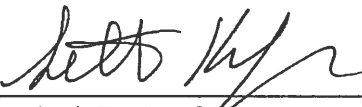
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
1745 Broadway, 22nd Floor
New York, New York
(212) 492-2092

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on this 2nd day of July, 2015, the foregoing **Petition for Review** was served upon the following persons at the addresses shown below via Federal Express and was filed with the Clerk of the Court which will send notification of the filing to the following persons at the addresses shown below:

Linda J. Dreeben
National Labor Relations Board
Appellate and Litigation Branch
1099 14th Street, N.W.
Washington, D.C. 20570

1199 SEIU United Health
Care Workers East
55 US Highway 1 South, Ste. 301A
Iselin, NJ 08830

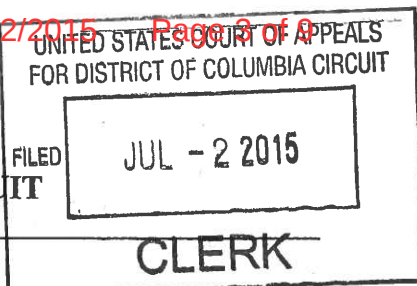
By: 
Seth D. Kaufman

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
1745 Broadway, 22nd Floor
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800 RIVER ROAD OPERATING
COMPANY LLC d/b/a WOODCREST
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Petition for Review

**DISCLOSURE STATEMENT OF PETITIONER 800 RIVER ROAD OPERATING
COMPANY LLC d/b/a WOODCREST HEALTH CARE CENTER**

Petitioner 800 River Road Operating Company LLC d/b/a Woodcrest Health Care Center, by and through its attorneys Ogletree, Deakins, Nash, Smoak & Stewart, P.C., pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, declares that its sole member is THCI of New Jersey, LLC and that no publically held company has a 10% or greater interest in any of the entities identified above.

A supplemental disclosure statement will be filed upon any change in the information provided by this statement.

By:


Seth D. Kaufman

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
1745 Broadway, 22nd Floor
New York, New York
(212) 492-2092

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on this 2nd day of July, 2015, the foregoing **Disclosure Statement of Petitioner 800 River Road Operating Company LLC d/b/a Woodcrest Health Care Center** was filed with the Clerk of the Court which will send notification of the filing to:

Linda J. Dreeben
National Labor Relations Board
Appellate and Litigation Branch
1099 14th Street, N.W.
Washington, D.C. 20570

By: 
Seth D. Kaufman

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
1745 Broadway, 22nd Floor
New York, New York
(212) 492-2092

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NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

800 River Road Operating Company LLC, d/b/a Woodcrest Health Care Center and 1199 SEIU United Healthcare Workers East. Case 22-CA-097938

June 15, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND MCFERRAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed by 1199 SEIU United Healthcare Workers East (the Union) on February 7, 2013, the Acting General Counsel issued the complaint on February 19, 2013, alleging that 800 River Road Operating Company LLC, d/b/a Woodcrest Healthcare Center (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain and to furnish relevant and necessary information following the Union's certification in Case 22-RC-073078. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On March 12, 2013, the Acting General Counsel filed a Motion for Summary Judgment. On March 13, 2013, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

On July 10, 2013, the National Labor Relations Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No. 129. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, on June 27, 2014, the Board issued an order setting aside the Decision and Order, and retained this case on its docket for further action as appropriate.

On November 26, 2014, the Board issued a further Decision, Certification of Representative, and Notice to Show Cause in Cases 22-CA-097938 and 22-RC-073078, which is reported at 361 NLRB No. 117. That Decision provided leave to the General Counsel to amend the complaint on or before December 8, 2014, to conform with the current state of the evidence, including whether the Respondent had agreed to recognize and bargain with the Union after the November 26, 2014 certification of representative issued.

On February 10, 2015, the General Counsel filed a motion to amend the complaint, under Section 102.17 of the Board's Rules and Regulations. On February 27, 2015, the Respondent filed a response in opposition to the General Counsel's motion, arguing that the motion to amend should be denied because the General Counsel had failed to meet the Board's stated deadline and because the Respondent's actions do not warrant an amendment to the complaint.

On March 17, 2015, the Board issued an Order Granting Motion to Amend Complaint and Further Notice to Show Cause in which it accepted the amended complaint, and directed that the Respondent file an answer to the amended complaint on or before March 31, 2015, and that cause be shown, in writing, on or before April 7, 2015, as to why the General Counsel's Motion for Summary Judgment should not be granted by the Board. On March 31, 2015, the Respondent filed an answer to the amended complaint. Thereafter, the General Counsel filed a statement in support of the motion for summary judgment, and the Respondent filed a Response to the Notice to Show Cause.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain and to provide information, but contests the validity of the certi-

¹ The amended complaint adds "November 26, 2014" as the date the Board certified the Union as the exclusive collective-bargaining representative of the unit employees, alleges in relevant part that, about January 18, 2013, the Union requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit employees, and furnish it with information necessary for, and relevant to, the performance of its duties, and that since about January 18, 2013, the Respondent has refused to do so. The amended complaint further alleges that about January 22, 2015, the Union again requested bargaining and by letter dated February 2, 2015, the Respondent declined to recognize and bargain with it. The amended answer admits the factual allegations of the complaint, incorporates by reference the arguments made in the underlying representation proceeding, and argues generally, without elaboration, that "[t]he Board's decision to certify the bargaining unit in Case 22-RC-073078 has no basis in fact or law."

fication on the basis of issues raised in the representation proceeding.²

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

We also find that there are no factual issues warranting a hearing with respect to the Union's request for information. The complaint alleges, and the Respondent admits, that by letter dated January 18, 2013, the Union requested the following information:

1. The names, job title, date of hire, regular hours of work, hourly rate of pay and home address for all employees in the collective bargaining unit certified by the NLRB.
2. Documents showing any and all wage increases and/or bonuses paid to each bargaining unit employee since January 1, 2010.
3. Copies of daily work schedules for all nursing units showing the work schedule of bargaining unit employees on each unit for all shifts for the period November 1, 2012 to the present.
4. Manuals, employment handbooks and any other documents describing terms and conditions of employment for employees in the bargaining unit, including but not limited to, any such documents distributed to employees at any time between January 1, 2011 to the present.

It is well established that the foregoing type of information concerning the terms and conditions of employ-

ment of unit employees is presumptively relevant for purposes of collective bargaining and must be furnished on request. See, e.g. *Metro Health Foundation, Inc.*, 338 NLRB 802 (2003). The Respondent has not asserted any basis for rebutting the presumptive relevance of the information. Rather, the Respondent raises as an affirmative defense its contentions, rejected above, that the Union was improperly certified. We find that the Respondent unlawfully refused to furnish the information sought by the Union.

Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Delaware Limited Liability Company, with an office and place of business in New Milford, New Jersey, has been engaged in the operation of a rehabilitation and nursing facility.

During the 12-month period preceding issuance of the complaint, the Respondent has derived gross revenues in excess of \$100,000, and purchased and received at its New Milford, New Jersey facility goods and supplies valued in excess of \$50,000 directly from suppliers located outside the State of New Jersey.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act, and that the Union, 1199 SEIU United Healthcare Workers East, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on March 9, 2012, the Union was certified on November 26, 2014, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full time and regular part time non-professional employees including licensed practical nurses, certified nursing aides, dietary aides, housekeepers, laundry aides, porters, recreation aides, restorative aides, rehabilitation techs, central supply clerks, unit secretaries, receptionists and building maintenance workers employed by the Employer at its New Milford, New Jersey facility, but excluding all office clerical employees, cooks, registered nurses, dietitians, physical therapists, physical therapy assistants, occupational therapists, occupational therapy assistants, speech therapists, social workers, staffing coordinators/schedulers, pay-

² Par. 16 of the amended complaint alleges that on January 22, 2015, the Union requested in writing that the Respondent bargain with the Union as the representative of the unit employees. The Respondent admitted that allegation, but denied that the Board's "decision has any factual or legal basis." It appears that the Respondent confused paragraph numbers in the amended complaint, as that answer appears to be responsive to par. 15 of the amended complaint. Additionally, par. 17 of the amended complaint alleges that by letter dated February 2, 2015, the Respondent declined to recognize and bargain with the Union as the unit employees' exclusive collective-bargaining representative. In its answer, the Respondent denies this allegation. In its response to the Notice to Show Cause, the Respondent admits that it sent its February 2, 2015 letter to the Union but argues that it did not commit an independent refusal to bargain. Thus, there are no issues of fact to be determined by a hearing.

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roll/benefits coordinators, MDS specialists, MDS data clerks, account payable clerks, account receivable clerks, all other professional employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

About January 18, 2013, and January 22, 2015, the Union requested in writing that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit. Since about January 18, 2013, and continuing to date, the Respondent has failed and refused to recognize and bargain with the Union as the unit employees' exclusive collective-bargaining representative.

About January 18, 2013, and January 22, 2015, the Union requested in writing that the Respondent furnish it with the information set forth above that is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit. Since about January 18, 2013, and continuing to date, the Respondent has failed and refused to furnish the Union with the requested information.

We find that these failures and refusals constitute an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit, and to furnish the Union with the requested information regarding the terms and conditions of employment of unit employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.³

³ In *Howard Plating Industries*, 230 NLRB 178, 179 (1977), the Board stated:

Although an employer's obligation to bargain is established as of the date of an election in which a majority of unit employees vote for union representation, the Board has never held that a simple refusal to initiate collective-bargaining negotiations pending final Board resolution of timely filed objections to the election is a *per se* violation of Section 8(a)(5) and (1). There must be additional evidence, drawn from the employer's whole course of conduct, which proves that the refusal was made as part of a bad-faith effort by the employer to avoid its bargaining obligation.

No party has raised this issue, and we find it unnecessary to decide in this case whether the unfair labor practice began on the date of the Respondent's initial refusal to bargain at the request of the Union, or at some point later in time. It is undisputed that the Respondent has con-

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to recognize and bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement. We shall also order the Respondent to furnish the Union with the information it requested.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, 800 River Road Operating Company LLC, d/b/a Woodcrest Health Care Center, New Milford, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with 1199 SEIU United Healthcare Workers East as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) Failing and refusing to furnish the Union with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full time and regular part time non-professional employees including licensed practical nurses, certified

continued to refuse to bargain since the Union's certification and we find that continuing refusal to be unlawful. Regardless of the exact date on which Respondent's admitted refusal to bargain became unlawful, the remedy is the same.

nursing aides, dietary aides, housekeepers, laundry aides, porters, recreation aides, restorative aides, rehabilitation techs, central supply clerks, unit secretaries, receptionists and building maintenance workers employed by the Employer at its New Milford, New Jersey facility, but excluding all office clerical employees, cooks, registered nurses, dietitians, physical therapists, physical therapy assistants, occupational therapists, occupational therapy assistants, speech therapists, social workers, staffing coordinators/schedulers, payroll/benefits coordinators, MDS specialists, MDS data clerks, account payable clerks, account receivable clerks, all other professional employees, guards and supervisors as defined in the Act.

(b) Furnish to the Union in a timely manner the information requested by the Union on January 18, 2013, and again on January 22, 2015.

(c) Within 14 days after service by the Region, post at its New Milford, New Jersey facility copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 18, 2013.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 22 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 15, 2015

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with 1199 SEIU United Healthcare Workers East as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT fail and refuse to furnish the Union with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full time and regular part time non-professional employees including licensed practical nurses, certified nursing aides, dietary aides, housekeepers, laundry aides, porters, recreation aides, restorative aides, reha-

WOODCREST HEALTH CARE CENTER

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bilitation techs, central supply clerks, unit secretaries, receptionists and building maintenance workers employed by us at our New Milford, New Jersey facility, but excluding all office clerical employees, cooks, registered nurses, dietitians, physical therapists, physical therapy assistants, occupational therapists, occupational therapy assistants, speech therapists, social workers, staffing coordinators/schedulers, payroll/benefits coordinators, MDS specialists, MDS data clerks, account payable clerks, account receivable clerks, all other professional employees, guards and supervisors as defined in the Act.

WE WILL furnish to the Union in a timely manner the information requested by it on January 18, 2013, and again on January 22, 2015.

800 RIVER ROAD OPERATING COMPANY LLC,
D/B/A WOODCREST HEALTH CARE CENTER

The Board's decision can be found at www.nlrb.gov/case/22-CA-097938 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

